

[Cite as *State v. D.A.*, 2009-Ohio-3103.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91597

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

D. A.

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-231074

BEFORE: Celebrezze, J., Cooney, A.J., and Boyle, J.

RELEASED: June 25, 2009

JOURNALIZED:
ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor
BY: Diane Smilanick
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

FOR APPELLEE

D. A., pro se
4432 West 51st Street
Cleveland, Ohio 44144

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, State of Ohio, brings this appeal challenging the court's decision to seal the record of appellee, D. A.,¹ in regard to a 1989 felony conviction. The issue presented on appeal is whether appellee is a "first offender," as defined in R.C. 2953.31(A), and thus eligible for expungement. Upon review of the record, and for the reasons set forth below, we reverse the decision of the trial court.

{¶ 2} On August 24, 1988, appellee was observed by Cleveland police officers acting suspiciously. One officer testified that appellee and three other individuals approached a parked car and tried to enter the vehicle using a screw driver. When pedestrians approached the area, appellee and the other three individuals left. Police arrested appellee and the others.

{¶ 3} On January 27, 1989, appellee pleaded no contest to attempted grand theft motor vehicle and possession of criminal tools. Appellee received a suspended sentence, he was placed on two years probation, ordered to pay one quarter of the total amount of restitution, and required to complete 100 hours of community work service.

{¶ 4} On July 16, 1998, appellee pleaded no contest to driving under the influence of alcohol or drugs ("DUI"). He was sentenced to 30 days incarceration,

¹The anonymity of the defendant is preserved in accordance with this court's Guidelines for Sealing Records on Criminal Appeals.

with 27 days suspended, and placed on probation for six months with the condition he attend substance abuse counseling. Appellee also pleaded no contest to a charge of consumption of liquor in parks on April 18, 2004.

{¶ 5} On February 4, 2008, appellee petitioned the court to seal the records of his 1989 felony conviction pursuant to R.C. 2953.32(A)(1). Appellee stated that he spent a great deal of time and effort to get an education and was having difficulty finding employment because of his criminal record. The state objected to appellee's application and requested that the court order an expungement investigation report.

{¶ 6} A report was prepared and delivered to the court for its review prior to the expungement hearing to be held on May 9, 2008. The report contained details of appellee's 1998 and 2004 convictions as well as other arrests since 1988. The state objected to the expungement because appellee had subsequent convictions and was arrested for a violent felony in 2005, although no conviction resulted from that arrest. The 2005 case was scheduled for trial twice and dismissed both times because witnesses failed to appear to testify.

{¶ 7} At the conclusion of the expungement hearing, the court granted appellee's request and ordered his record in regard to the 1989 conviction sealed. In its journal entry granting expungement, the court found that appellee "is a first offender under R.C. 2953.31(A); *** that the applicant has been rehabilitated to the satisfaction of the court; *** and that the interests of the

applicant in having the records pertaining to the applicant's conviction sealed are not outweighed by the legitimate governmental needs to maintain those records.”

Review and Analysis

{¶ 8} The state filed this timely appeal and raises one assignment of error for our review.

First Offender

{¶ 9} “I. The trial court erred in granting the appellee's request for sealing of the record because appellee was not a first offender pursuant to R.C. 2953.31.”

{¶ 10} The state argues on appeal that appellee was not a first offender as defined by R.C. 2953.31(A) because of his DUI conviction subsequent to the 1989 felony conviction.

{¶ 11} Generally, the applicable standard of review is abuse of discretion; however, whether one is a first offender is a question of law, and appellate courts may apply a de novo standard of review. See *State v. Ellis*, Cuyahoga App. No. 83207, 2004-Ohio-3108; *State v. Napier* (Oct. 19, 1998), Warren App. No. CA98-04-048. Whether one is a first offender is a matter of statutory interpretation, which is a question of law. This inquiry entails an independent review without deference to the trial court's determination. See *State v. Aggarwal* (1986), 31 Ohio App.3d 32, 507 N.E.2d 1167; *Chillicothe v. Herron* (1982), 3 Ohio App.3d

468, 445 N.E.2d 1171; *State v. Penn* (1977), 52 Ohio App.2d 315, 369 N.E.2d 1229.

{¶ 12} R.C. 2953.32 allows a court to expunge a criminal record under certain circumstances. It states in relevant part: “(1) Except as provided in section 2953.61 of the Revised Code, a first offender may apply to the sentencing court if convicted in this state, *** for the sealing of the conviction record. Application may be made at the expiration of three years after the offender's final discharge if convicted of a felony.”

{¶ 13} Under R.C. 2953.32(B), the court must hold an expungement hearing to give the state an opportunity to oppose the application.² At an expungement hearing, the court must determine, among other things, whether the applicant is a first offender as defined in R.C. 2953.31(A). See R.C. 2953.32(C)(1). This section defines a first offender in pertinent part as “anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction.”

²R.C. 2953.32(B) states: “Upon the filing of an application under this section, the court shall set a date for a hearing and shall notify the prosecutor for the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified. The court shall direct its regular probation officer, a state probation officer, or the department of probation of the county in which the applicant resides to make inquiries and written reports as the court requires concerning the applicant.”

{¶ 14} As originally enacted, the definition of a first offender was very restrictive. See 140 Ohio Laws, Part I, 2382, 2383. This evidenced an intent on the part of the legislature to grant the privilege of expungement only to those that maintained a clean criminal record before and after the conviction for which an expungement application was submitted. Expungement was a second chance for those that stray from a law-abiding life but once. This dead-set stance acted as a severe hurdle to expungement for reformed individuals who had minor traffic infractions on their record. *State v. Sandlin*, 86 Ohio St.3d 165, 168, 1999-Ohio-147, 712 N.E.2d 740.

{¶ 15} In response to this issue, the Ohio legislature amended the definition to exempt minor traffic offenses and minor misdemeanors. 140 Ohio Laws, Part I, 2382, 2383. R.C. 2953.31(A) now excludes a conviction for a minor misdemeanor or a violation of any section in Chapters 4507, 4510, 4511, 4513, or 4549 of the Revised Code (or a substantially similar municipal ordinance) from the calculus of determining if an applicant is a first offender. The state limited this exception by making a conviction for a violation of, among other things, DUI,³ a previous or subsequent conviction, which serves as a bar to expungement. *Sandlin*, at 167. Further, a DUI conviction cannot be expunged. R.C. 2953.36(B). Therefore, it always acts as a bar to expungement. *Sandlin*, at 168.

{¶ 16} The Ohio Supreme Court held in *Sandlin* that a conviction for DUI is an automatic bar to expungement. In that case, the conviction arose from actions committed at the same time as the conviction that the applicant sought to expunge. The court found that even though the separate convictions constituted one incident,⁴ the DUI conviction barred expungement. *Id.* at 167-168. The Court held that “R.C. 2953.31 and 2953.32 bar the sealing or expungement of the record of any other conviction when a person has been convicted of a violation of R.C. 4511.19, regardless of whether the R.C. 4511.19 conviction and the other conviction resulted from the same act.” *Id.* at 168.

{¶ 17} In the present case, appellee was convicted of DUI. This conviction acts to bar an expungement sought under R.C. 2953.32 because appellee is not a first offender as defined in R.C. 2953.31. Therefore, we sustain the state’s sole assignment of error.

{¶ 18} This cause is reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

³ R.C. 4511.19.

⁴This would normally be considered only one conviction for the purposes of determining whether one is a first offender. See R.C. 2953.31(A).

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY JANE BOYLE, J., CONCUR